UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

VIACOM INTERNATIONAL, INC., COMEDY PARTNERS, COUNTRY MUSIC TELEVISION, INC., PARAMOUNT PICTURES CORPORATION, and BLACK ENTERTAINMENT TELEVISION LLC, Plaintiffs, vs. YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE, INC., Defendants.	Case No. 1:07CV02103
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, BOURNE CO., et al., on behalf of themselves and all others similarly situated, Plaintiffs, vs. YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE, INC., Defendants.	Case No. 07CV3582

DEPOSITION OF MICAH SCHAFFER

SAN FRANCISCO, CALIFORNIA

WEDNESDAY, JULY 23, 2008

REPORTED BY:

YVONNE FENNELLY, CRP, CSR NO. 5495

JOB NO. 15376

JULY 23, 2008

10:00 a.m.

VIDEOTAPED DEPOSITION OF MICAH SCHAFFER,

held at the offices of SHEARMAN & STERLING,

525 Market Street, San Francisco, California,

pursuant to notice, before YVONNE FENNELLY, CRP,

CSR License No. 5495.

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--oOo--

02:03 Premier League content?
02:03 A. These are very different times,
02:03 chronologically. This e-mail is from May 2006. Our
02:03 site was a very different size then, and we were a small
02:03 company still figuring out exactly what the appropriate
02:03 balance was and how to scale things like this.
02:03 So one of the things that we discovered as we
02:03 were doing this -- and of course we were doing this
02:03 because -- we were doing this for the RIAA because we
02:03 wanted to be helpful; right? We wanted to work with
02:03 content owners, and especially when they first signed up
02:03 for it, I imagine, you know, there was somewhat of a
02:04 backlog when they first began removing their content
02:04 from YouTube. There has got to be, you know, some extra
02:04 content that had been previously uploaded, and we
02:04 didn't -- you know, we felt that it would be a good
02:04 service to provide to them to, you know, to try to help
02:04 them with that burden.
02:04 But what we found over time was that, first, we
02:04 weren't very good at it. We couldn't tell, you know,
02:04 what was authorized or not. We really wouldn't know
02:04 necessarily who had uploaded it. We wouldn't know
02:04 whether particular videos were authorized or if, like,
02:04 NBC -- NBC is a great example of someone who was using

scans, sure.

Q. Do you recall any discussions about whether or not to continue the practice?

A. I don't recall.

Q. You mentioned that one aspect of proactive scanning involves the potential misidentifications or incorrect decisions; is that right?

A. Absolutely.

Q. Were you involved in or aware of any analysis that YouTube did as to the extent of misidentifications from proactive scanning?

A. I don't recall any specifically.

Q. To be more particular about the point, do you recall anybody at YouTube doing any analysis to see quantitatively how often misidentifications occurred from proactive scanning?

A. I think it was more anecdotal.

Q. You referred to difficulties with scalability as videos on the site grew; is that correct?

A. Sure.

Q. Do you recall any analysis at YouTube as to the viability of proactive scanning to remove content with the increased traffic and number of videos at the site?

A. I think it was more of a general notion that

In fact, you know, you meant generally? Customer support, responding to copyright takedown notices is a big part of it, removing inappropriate content that had been flagged, support e-mails, those types of tasks.

Q. And did Ms. Gillette have a practice of creating a priority list for each day?

A. I don't think so.

Q. Do you recall what her practice was in terms of generating priorities lists or what circumstances she would do it?

A. Probably whenever she felt the need maybe. It changed. I don't know. I wouldn't -- I might be on the list that would receive them, but they wouldn't typically define my work, so I'm not too familiar with the logistics of the priorities lists.

Q. You recall that they were conveyed to you as priorities for your work?

A. No. For other members of the team, but I might be privy to them.

Q. There is a reference in item 12 here, Proactive scans copyright scans (don't forget American Idol)?

A. Yes.

Q. Do you recall whether the operations team

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scanned for American Idol?

A. On occasions.

Q. Were you involved in proactive scans for American Idol?

A. On occasions.

Q. And what occasions would give rise to the proactive scans?

A. We had been in -- some of this is probably privileged.

MR. SCHAPIRO: Can you give as much of an answer as you can without discussing any legal advice that you received or sought?

THE WITNESS: Yes, I can try to be general enough.

So we had been working with -- I believe it's Fremantle owns American Idol. They were very adamant -- they were very upset by the presence of content that they felt -- or content that they owned that was being uploaded to YouTube. And we would ask them, plead with them really for URL's, for specific links, for specific indications what content they were talking about, and they were not very cooperative. They refused to provide on most occasions specific information and were threatening to sue us on a fairly regular basis on very

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strong terms. And particularly this would happen, you know, right around the time -- of course it's a cyclical show; right, it's a series. So right during the time a show would air they would come down; they would get particularly more upset.

And, you know, in August we were still -- you know, we hadn't been bought by Google yet. We were very resource constrained. And even though we were operating within the law, my feeling at least, and I imagine the feeling of others was that a lawsuit would be very bad and that we might not be able to adequately defend ourselves. So even though I don't think we were obligated to go scan and guess which content was American Idol, and I know mistakes were made because there is many different idol shows around the world, there are parodies, there are lots of videos. I mean, people, you know, singing in their bathrooms or their bedrooms, and they would tag it American Idol because they are doing their best, you know, or they're commenting on American Idol, and things like that. And sometimes, you know, inevitably those videos would get swept up in this, but we kept doing those scans for a time simply because it was -- you know, if we had gotten sued at that point, even though we were doing nothing

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wrong, it wouldn't necessarily matter that we were in the right because we didn't necessarily have the resources to adequately defend ourselves, so, you know, they bullied us. And even though we really -- and the irony is we really wanted to cooperate. We really genuinely wanted their content down; and, that's why in the end we'd grudgingly do these searches for them even though it really wasn't the most effective use.

We offered them the tool repeatedly, you know, our content verification program. We pleaded with them to work with us. And we really, you know, sort of, in the absence of their cooperation, we bent over backwards trying to accommodate them.

Q. Did you speak to anyone at Fremantle?

MR. SCHAPIRO: When?

BY MR. SHAFTEL:

Q. By August of 2006, about their concerns over the infringing content on the site?

A. I don't know if I personally had contact with them directly. And again, getting into privilege, I would be hesitant to characterize my knowledge of other communications.

MR. SCHAPIRO: Don't answer further.

BY MR. SHAFTEL:

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A. I didn't see the second page. Hang on a moment.

No.

Q. Have you ever seen a document in which the format resembles this?

A. No, I don't recall ever seeing a document that looked like this.

Q. Do you see in the middle of the page there is a number of what appears to be TV shows or other entertainment content identified that begins with American Idol, Simpsons, Family Guy?

A. Yes.

Q. Does that grouping of content have any meaning to you?

And specifically, were those videos that at this point in time were being proactively scanned for?

A. In the context of the document, I'm not sure if they're necessarily search terms. I think it's probably a reasonable assessment that they are related to content to proactively look for.

Q. In August of 2006, how many videos do you recall approximately being on the YouTube site?

A. I have no idea. Lots.

Q. Do you recall whether YouTube engaged in any

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proactive scanning to remove content after the acquisition by Google in November of 2006?

A. I don't recall specifically. I guess it comes back to exactly what we mean by "proactive."

If being threatened and prompted and instructed by Fremantle, for instance, and then taking action based on the information they provided and conveyed and requested, I would say, then, I do recall that happening. I forget the level of detail. I know eventually they began providing us with more detailed information about what they would like removed, and we responded, you know, to those requests.

I don't recall with regard specifically to proactively searching for content without prompting in that regard.

Q. So I can understand, you recall searching for Fremantle content to remove without specific URL's from Fremantle or DMCA notice after the Google acquisition; is that correct?

A. I believe so.

I believe there were instances where they provided -- I know at some point they began -- I remember receiving, I think it was like a printout of search results that Fremantle had provided and doing

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removals based on that. And I know there was some back and forth around that.

Q. Do you recall doing that for anyone else besides Fremantle after the Google acquisition?

A. I believe there were probably others.

Q. Who do you recall?

A. And to varying degrees, of course; right? As I said earlier, we regularly remove content without fully -- without fully formed technically valid DMCA takedown notices. And it's kind of a spectrum of, you know, of the amount of specificity and the amount of technical accuracy, and we try to respond appropriately based on the circumstances. And I know we've removed a substantial amount of Viacom content without fully formed DMCA notices as well.

Q. Do you recall removing Viacom content that was uploaded after the date of whatever communication you're relying on, even if it's not, as you put it, a fully formed DMC notice?

MR. SCHAPIRO: Objection; vague, ambiguous.

BY MR. SHAFTEL:

Q. You've described the situation where a content owner submits a notification that I believe you put it, is not fully formed; it may have some technical defect.

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know, fraud detection and spam and things like that.

YouTube has not yet fully integrated with Google's account management system. I believe we have plans to in the near term, and it involves a lot of other moving pieces, but to the extent possible, we try to leverage that system.

BY MR. SHAFTEL:

Q. Thank you.

You had testified earlier today about MD5 hashes.

Am I correct that when content is removed pursuant to the DMCA process, YouTube then takes some action based on MD5 hashes?

A. Yes.

Q. How does it work?

A. So when content is removed for terms of use violation or in response to a copyright notification, our system automatically implements a block on the originally uploaded files, MD5 hash.

Q. Do the MD5 hashes, have they ever at YouTube operated to delete videos that were existing on the system before the video that is taken down?

A. So the question is about preexisting?

Q. Exactly.

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04:56 Are you aware of any ideas that were expressed
04:56 within YouTube or then Google post-acquisition to detect
04:56 or exclude copyrighted infringing material on a site
04:56 that the company didn't implement?
04:56 A. You said "detect," or is there another part?
04:56 Q. Exclude. Block.
04:56 A. So it involved blocking as a result of
04:56 detecting?
04:56 Q. (Nods head.)
04:56 A. None that I can recall.
04:56 Q. I'd asked you earlier about private videos or
04:57 Friend Share videos.
04:57 A. Yes.
04:57 Q. Do you understand that to be a program where
04:57 the uploader can limit the number of visitors to the
04:57 uploader's video or site page?
04:57 A. I'm sorry?
04:57 Q. What's the private -- what's the private video
04:57 program? What does it mean?
04:57 A. Users can designate a video as private either
04:57 when they upload it or subsequently by altering their
04:57 preferences and allows the video to be viewed by a
04:57 limited audience of their choosing.
04:57 Q. And how are private videos monitored for your

05:40 MR. McGILL: Are we up to Exhibit 17 or 15?
05:40 THE WITNESS: The last one was 15.
05:40 MR. McGILL: So this should be 16.
05:41 THE WITNESS: Okay.
05:41 BY MR. COX:
05:41 Q. In this declaration, Mr. Chen states that
05:41 YouTube does not manually screen videos before they are
05:41 made available through the service.
05:41 Do you agree with that statement?
05:41 A. So at the time of this declaration -- actually,
05:41 I see the date of the hearing. I'm not sure when the
05:41 declaration was executed.
05:41 January 5th, apparently, 2007. I don't believe
05:41 that was our standard practice, no.
05:41 Q. I'm sorry. To clarify, you don't believe that
05:41 screening videos manually before they were made
05:41 available was your standard practice? So you agree with
05:42 the statement?
05:42 A. I don't believe that was our practice.
05:42 Q. Do you know of any other time when that was
05:42 your practice?
05:42 A. I think the sentence is slightly ambiguous. I
05:42 wouldn't want to preclude the kinds of things we
05:42 discussed earlier with regards to private videos, though

I suppose those were available. So no, I guess I'm not aware of any circumstances.

Q. After the videos were made available through the service at the time of this declaration, were you aware of efforts YouTube was making to manually screen videos?

MR. SCHAPIRO: Objection to the form of the question.

THE WITNESS: Well, again, I think the term "manually screen videos" is ambiguous.

BY MR. SHAFTEL:

Q. In what way?

A. So I'm not sure -- it could mean any number of things.

Q. What are the different things you think it could mean?

A. It could refer to -- and again, we're talking about after they're available through the service?

Q. Yes.

A. It could refer to when a content owner sends in a nonspecific takedown notice, perhaps involving search terms, or even search results that would require us to go through and manually look through the content that's being referred to.